Lorillard Tobacco v. Reilly

533 U.S. 525
Supreme Court of the United States
June 28, 2001

LORILLARD TOBACCO CO. et al. v. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS, et al. No. 00-596. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT Argued April 25, 2001. Decided June 28, 2001. Together with No. 00-597, *Altadis U. S. A. Inc., as Successor to Consolidated Cigar Corp. and Havatampa, Inc., et al.* v. *Reilly, Attorney General of Massachusetts, et al.,* also on certiorari to the same court. Briefs of *amici curiae* urging reversal were filed for the American Advertising Federation *;* for the American Association of Advertising Agencies et al.*;* for the Association of National Advertisers, Inc.*;* for Infinity Outdoor, Inc.*;* for the National Association of Convenience Stores*;* for the Newspaper Association of America et al.*;* for the Product Liability Advisory Council, Inc.*;* and for the Washington Legal Foundation. Briefs of *amici curiae* urging affirmance were filed for the State of California, the Corporation Counsel of the District of Columbia, and the attorneys general of Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, the Northern Mariana Islands, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin; for the Cities of Oakland, California, for the City of Los Angeles*;* for the City of New York; and for the American Legacy Foundation*;* for the American Medical Association et al.*;* for the National Center for Tobacco-Free Kids et al.*;* for the National Conference of State Legislatures et al.*;* and for the Tobacco Control Resource Center, Inc.. Briefs of *amici curiae* were filed for the State's Attorney of Dupage County, Illinois, et al.*;* and for the American Planning Association by *Randal R. Morrison. Jeffrey S. Sutton* argued the cause for petitioners in No. 00-596. With him on the briefs were *Daniel P. Collins, Michael R. Doyen, Fred A. Rowley, Jr., Kenneth S. Geller, Andrew L. Frey, Richard M. Zielinski, John L. Strauch, Gregory G. Katsas, John B. Connarton, Jr., Patricia A. Barald,* and *David H. Remes. James V. Kearney* filed a brief for petitioners in No. 00-597. With Mr. Kearney on the brief were *Christopher Harris* and *Richard P. Bress. Peter J. McKenna* and *Eric S. Sarner* filed a brief for petitioner U. S. Smokeless Tobacco Company in both cases. *William W. Porter,* Assistant Attorney General of the Commonwealth of Massachusetts, argued the cause for respondents in both cases. With him on the brief were *Thomas F. Reilly,* Attorney General, and *Susan Paulson,* Assistant Attorney General. *Acting Solicitor General Underwood* argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Acting Assistant Attorney General Schiffer, Deputy Solicitor General Kneedler, Irving L. Gornstein,* and *Douglas N. Letter.* O'Connor, J., delivered the opinion of the Court, Parts I, II-C, and II-D of which were unanimous; Parts III-A, III-C, and III-D of which were joined by Rehnquist, C. J., and Scalia, Kennedy, Souter, and Thomas, JJ.; Part III-B-1 of which was joined by Rehnquist, C. J., and Stevens, Souter, Ginsburg, and Breyer, JJ.; and Parts II-A, II-B, III-B-2, and IV of which were joined by Rehnquist, C. J., and Scalia, Kennedy, and Thomas, JJ. Kennedy, J., filed an opinion concurring in part and concurring in the judgment, in which Scalia, J., joined. Thomas, J., filed an opinion concurring in part and concurring in the judgment. Souter, J., filed an opinion concurring in part and dissenting in part. Stevens, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which Ginsburg and Breyer, JJ., joined, and in which Souter, J., joined as to Part I.

Justice O'Connor, delivered the opinion of the Court.

In January 1999, the Attorney General of Massachusetts promulgated comprehensive regulations governing the advertising and sale of cigarettes, smokeless tobacco, and cigars. 940 Code of Mass. Regs. §§ 21.01-21.07, 22.01-22.09 (2000). Petitioners, a group of cigarette, smokeless tobacco, and cigar manufacturers and retailers, filed suit in Federal District Court claiming that the regulations violate federal law and the United States Constitution. In large measure, the District Court determined that the regulations are valid and enforceable. The United States Court of Appeals for the First Circuit affirmed in

part and reversed in part, concluding that the regulations are not pre-empted by federal law and do not violate the First Amendment. The first question presented for our review is whether certain cigarette advertising regulations are pre-empted by the Federal Cigarette Labeling and Advertising Act (FCLAA), 79 Stat. 282, as amended, 15 U. S. C. § 1331 *et seq.* The second question presented is whether certain regulations governing the advertising and sale of tobacco products violate the First Amendment.

I

In November 1998, Massachusetts, along with over 40 other States, reached a landmark agreement with major manufacturers in the cigarette industry. The signatory States settled their claims against these companies in exchange for monetary payments and permanent injunctive relief. See App. 253-258 (Outline of Terms for Massachusetts in National Tobacco Settlement); Master Settlement Agreement (Nov. 23, 1998), http://www.naag.org. At the press conference covering Massachusetts' decision to sign the agreement, then-Attorney General Scott Harshbarger announced that as one of his last acts in office, he would create consumer protection regulations to restrict advertising and sales practices for tobacco products. He explained that the regulations were necessary in order to "close holes" in the settlement agreement and "to stop Big Tobacco from recruiting new customers among the children of Massachusetts." App. 251.

In January 1999, pursuant to his authority to prevent unfair or deceptive practices in trade, Mass. Gen. Laws, ch. 93A, § 2 (1997), the Massachusetts Attorney General (Attorney General) promulgated regulations governing the sale and advertisement of cigarettes, smokeless tobacco, and cigars. The purpose of the cigarette and smokeless tobacco regulations is "to eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold and distributed in Massachusetts in order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age . . . [and] in order to prevent access to such products by underage consumers." 940 Code of Mass. Regs. § 21.01 (2000). The similar purpose of the cigar regulations is "to eliminate deception and unfairness in the way cigars and little cigars are packaged, marketed, sold and distributed in Massachusetts [so that] . . . consumers may be adequately informed about the health risks associated with cigar smoking, its addictive properties, and the false perception that cigars are a safe alternative to cigarettes . . . [and so that] the incidence of cigar use by children under legal age is addressed . . . in order to prevent access to such products by underage consumers." *Ibid.* The regulations have a broader scope than the master settlement agreement, reaching advertising, sales practices, and members of the tobacco industry not covered by the agreement. The regulations place a variety of restrictions on outdoor advertising, point-of-sale advertising, retail sales transactions, transactions by mail, promotions, sampling of products, and labels for cigars.~

Before the effective date of the regulations, February 1, 2000, members of the tobacco industry sued the Attorney General in the United States District Court for the District of Massachusetts. Four cigarette manufacturers (Lorillard Tobacco Company, Brown & Williamson Tobacco Corporation, R. J. Reynolds Tobacco

Company, and Philip Morris Incorporated), a maker of smokeless tobacco products (U. S. Smokeless Tobacco Company), and several cigar manufacturers and retailers claimed that many of the regulations violate the Commerce Clause, the Supremacy Clause, the First and Fourteenth Amendments, and Rev. Stat. § 1979, 42 U. S. C. § 1983.~

In its first ruling, the District Court considered the Supremacy Clause claim that the FCLAA, 15 U. S. C. § 1331 *et seq.,* pre-empts the cigarette advertising regulations.~ In a separate ruling, the District Court considered the claim that the Attorney General's regulations violate the First Amendment.^ Rejecting petitioners' argument that strict scrutiny should apply, the court applied the four-part test of *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.,* 447 U. S. 557 (1980), for commercial speech.~ The United States Court of Appeals for the First Circuit issued a stay pending appeal~. With respect to the First Amendment, the Court of Appeals applied the *Central Hudson* test.~ The Court of Appeals stayed its mandate pending disposition of a petition for a writ of certiorari.~ We granted~ petitions^ to resolve the conflict among the Courts of Appeals with respect to whether the FCLAA pre-empts cigarette advertising regulations like those at issue here^, and to decide the important First Amendment issues presented in these cases.

II

Before reaching the First Amendment issues, we must decide to what extent federal law pre-empts the Attorney General's regulations. The cigarette petitioners contend that the FCLAA, 15 U. S. C. § 1331 *et seq.,* pre-empts the Attorney General's cigarette advertising regulations.~

Congress pre-empted state cigarette advertising regulations like the Attorney General's because they would upset federal legislative choices to require specific warnings and to impose the ban on cigarette advertising in electronic media in order to address concerns about smoking and health. Accordingly, we hold that the Attorney General's outdoor and point-ofsale advertising regulations targeting cigarettes are preempted by the FCLAA.~

III

By its terms, the FCLAA's pre-emption provision only applies to cigarettes. Accordingly, we must evaluate the smokeless tobacco and cigar petitioners' First Amendment challenges to the State's outdoor and point-of-sale advertising regulations. The cigarette petitioners did not raise a pre-emption challenge to the sales practices regulations. Thus, we must analyze the cigarette as well as the smokeless tobacco and cigar petitioners' claim that certain sales practices regulations for tobacco products violate the First Amendment.

A

For over 25 years, the Court has recognized that commercial speech does not fall outside the purview of the First Amendment.^ Instead, the Court has afforded

commercial speech a measure of First Amendment protection "commensurate" with its position in relation to other constitutionally guaranteed expression.^ In recognition of the "distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech," *Central Hudson, supra,*^ we developed a framework for analyzing regulations of commercial speech that is "substantially similar" to the test for time, place, and manner restrictions^. The analysis contains four elements:

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Central Hudson, supra*^.

Petitioners urge us to reject the *Central Hudson* analysis and apply strict scrutiny. They are not the first litigants to do so. See, *e. g., Greater New Orleans Broadcasting Assn., Inc.* v. *United States,* 527 U. S. 173, 184 (1999).~ But here, as in *Greater New Orleans,* we see "no need to break new ground. *Central Hudson,* as applied in our more recent commercial speech cases, provides an adequate basis for decision."^

Only the last two steps of *Central Hudson*'s four-part analysis are at issue here. The Attorney General has assumed for purposes of summary judgment that petitioners' speech is entitled to First Amendment protection.^ With respect to the second step, none of the petitioners contests the importance of the State's interest in preventing the use of tobacco products by minors.^

The third step of *Central Hudson* concerns the relationship between the harm that underlies the State's interest and the means identified by the State to advance that interest. It requires that

> "the speech restriction directly and materially advanc[e] the asserted governmental interest. `This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Greater New Orleans, supra*^.

We do not, however, require that "empirical data come . . . accompanied by a surfeit of background information. . . . [W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'"^.

The last step of the *Central Hudson* analysis "complements" the third step, "asking whether the speech restriction is not more extensive than necessary to serve the interests that support it."^ We have made it clear that "the least restrictive means" is not the standard; instead, the case law requires a reasonable "`fit between the legislature's ends and the means chosen to accomplish those

ends, . . . a means narrowly tailored to achieve the desired objective.'"^. Focusing on the third and fourth steps of the *Central Hudson* analysis, we first address the outdoor advertising and point-of-sale advertising regulations for smokeless tobacco and cigars. We then address the sales practices regulations for all tobacco products.

B

The outdoor advertising regulations prohibit smokeless tobacco or cigar advertising within a 1,000-foot radius of a school or playground.^ The District Court and Court of Appeals concluded that the Attorney General had identified a real problem with underage use of tobacco products, that limiting youth exposure to advertising would combat that problem, and that the regulations burdened no more speech than necessary to accomplish the State's goal.^ The smokeless tobacco and cigar petitioners take issue with all of these conclusions.

1

The smokeless tobacco and cigar petitioners contend that the Attorney General's regulations do not satisfy *Central Hudson* `s third step. They maintain that although the Attorney General may have identified a problem with underage cigarette smoking, he has not identified an equally severe problem with respect to underage use of smokeless tobacco or cigars. The smokeless tobacco petitioner emphasizes the "lack of parity" between cigarettes and smokeless tobacco.^ The cigar petitioners catalog a list of differences between cigars and other tobacco products, including the characteristics of the products and marketing strategies.^ The petitioners finally contend that the Attorney General cannot prove that advertising has a causal link to tobacco use such that limiting advertising will materially alleviate any problem of underage use of their products..~

Our review of the record reveals that the Attorney General has provided ample documentation of the problem with underage use of smokeless tobacco and cigars. In addition, we disagree with petitioners' claim that there is no evidence that preventing targeted campaigns and limiting youth exposure to advertising will decrease underage use of smokeless tobacco and cigars. On this record and in the posture of summary judgment, we are unable to conclude that the Attorney General's decision to regulate advertising of smokeless tobacco and cigars in an effort to combat the use of tobacco products by minors was based on mere "speculation [and] conjecture."^

2

Whatever the strength of the Attorney General's evidence to justify the outdoor advertising regulations, however, we conclude that the regulations do not satisfy the fourth step of the *Central Hudson* analysis. The final step of the *Central Hudson* analysis, the "critical inquiry in this case," requires a reasonable fit between the means and ends of the regulatory scheme.^ The Attorney General's regulations do not meet this standard. The broad sweep of the regulations indicates that the Attorney General did not "carefully calculat[e] the

costs and benefits associated with the burden on speech imposed" by the regulations.

The outdoor advertising regulations prohibit any smokeless tobacco or cigar advertising within 1,000 feet of schools or playgrounds. In the District Court, petitioners maintained that this prohibition would prevent advertising in 87% to 91% of Boston, Worcester, and Springfield, Massachusetts. The 87% to 91% figure appears to include not only the effect of the regulations, but also the limitations imposed by other generally applicable zoning restrictions. The Attorney General disputed petitioners' figures but "concede[d] that the reach of the regulations is substantial." Thus, the Court of Appeals concluded that the regulations prohibit advertising in a substantial portion of the major metropolitan areas of Massachusetts.

The substantial geographical reach of the Attorney General's outdoor advertising regulations is compounded by other factors. "Outdoor" advertising includes not only advertising located outside an establishment, but also advertising inside a store if that advertising is visible from outside the store. The regulations restrict advertisements of any size and the term advertisement also includes oral statements.

In some geographical areas, these regulations would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers. The breadth and scope of the regulations, and the process by which the Attorney General adopted the regulations, do not demonstrate a careful calculation of the speech interests involved.

First, the Attorney General did not seem to consider the impact of the 1,000-foot restriction on commercial speech in major metropolitan areas. The Attorney General apparently selected the 1,000-foot distance based on the FDA's decision to impose an identical 1,000-foot restriction when it attempted to regulate cigarette and smokeless tobacco advertising. But the FDA's 1,000-foot regulation was not an adequate basis for the Attorney General to tailor the Massachusetts regulations. The degree to which speech is suppressed – or alternative avenues for speech remain available – under a particular regulatory scheme tends to be case specific. And a case specific analysis makes sense, for although a State or locality may have common interests and concerns about underage smoking and the effects of tobacco advertisements, the impact of a restriction on speech will undoubtedly vary from place to place. The FDA's regulations would have had widely disparate effects nationwide. Even in Massachusetts, the effect of the Attorney General's speech regulations will vary based on whether a locale is rural, suburban, or urban. The uniformly broad sweep of the geographical limitation demonstrates a lack of tailoring.

In addition, the range of communications restricted seems unduly broad. For instance, it is not clear from the regulatory scheme why a ban on oral communications is necessary to further the State's interest. Apparently that restriction means that a retailer is unable to answer inquiries about its tobacco products if that communication occurs outdoors. Similarly, a ban on all signs of any size seems ill suited to target the problem of highly visible billboards, as opposed to smaller signs. To the extent that studies have identified particular advertising and promotion practices that appeal to youth, tailoring would involve

targeting those practices while permitting others. As crafted, the regulations make no distinction among practices on this basis.

The Court of Appeals recognized that the smokeless tobacco and cigar petitioners' concern about the amount of speech restricted was "valid," but reasoned that there was an "obvious connection to the state's interest in protecting minors."^ Even on the premise that Massachusetts has demonstrated a connection between the outdoor advertising regulations and its substantial interest in preventing underage tobacco use, the question of tailoring remains. The Court of Appeals failed to follow through with an analysis of the countervailing First Amendment interests.

The State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products. In a case involving indecent speech on the Internet we explained that "the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno* v. *American Civil Liberties Union,* 521 U. S. 844, 875 (1997) (citations omitted).^ As the State protects children from tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication. Cf. *American Civil Liberties Union, supra,* at 886-889 (O'Connor, J., concurring in judgment in part and dissenting in part) (discussing the creation of "adult zones" on the Internet).

In some instances, Massachusetts' outdoor advertising regulations would impose particularly onerous burdens on speech. For example, we disagree with the Court of Appeals' conclusion that because cigar manufacturers and retailers conduct a limited amount of advertising in comparison to other tobacco products, "the relative lack of cigar advertising also means that the burden imposed on cigar advertisers is correspondingly small."^ If some retailers have relatively small advertising budgets, and use few avenues of communication, then the Attorney General's outdoor advertising regulations potentially place a greater, not lesser, burden on those retailers' speech. Furthermore, to the extent that cigar products and cigar advertising differ from that of other tobacco products, that difference should inform the inquiry into what speech restrictions are necessary.

In addition, a retailer in Massachusetts may have no means of communicating to passersby on the street that it sells tobacco products because alternative forms of advertisement, like newspapers, do not allow that retailer to propose an instant transaction in the way that on site advertising does. The ban on any indoor advertising that is visible from the outside also presents problems in establishments like convenience stores, which have unique security concerns that counsel in favor of full visibility of the store from the outside. It is these sorts of considerations that the Attorney General failed to incorporate into the regulatory scheme.

We conclude that the Attorney General has failed to show that the outdoor advertising regulations for smokeless tobacco and cigars are not more extensive than necessary to advance the State's substantial interest in preventing underage tobacco use. Justice Stevens urges that the Court remand the case for further

development of the factual record.^ We believe that a remand is inappropriate in these cases because the State had ample opportunity to develop a record with respect to tailoring (as it had to justify its decision to regulate advertising), and additional evidence would not alter the nature of the scheme before the Court.^

A careful calculation of the costs of a speech regulation does not mean that a State must demonstrate that there is no incursion on legitimate speech interests, but a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products. After reviewing the outdoor advertising regulations, we find the calculation in these cases insufficient for purposes of the First Amendment.

C

Massachusetts has also restricted indoor, point-of-sale advertising for smokeless tobacco and cigars. Advertising cannot be "placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of" any school or playground.~

We conclude that the point-of-sale advertising regulations fail both the third and fourth steps of the *Central Hudson* analysis. A regulation cannot be sustained if it "provides only ineffective or remote support for the government's purpose,"^ or if there is "little chance" that the restriction will advance the State's goal^. As outlined above, the State's goal is to prevent minors from using tobacco products and to curb demand for that activity by limiting youth exposure to advertising. The 5-foot rule does not seem to advance that goal. Not all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings.~

Massachusetts may wish to target tobacco advertisements and displays that entice children, much like floor-level candy displays in a convenience store, but the blanket height restriction does not constitute a reasonable fit with that goal. The Court of Appeals recognized that the efficacy of the regulation was questionable, but decided that, "[i]n any event, the burden on speech imposed by the provision is very limited."^ There is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification. We conclude that the restriction on the height of indoor advertising is invalid under *Central Hudson* `s third and fourth prongs.~

IV

We have observed that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States."^ From a policy perspective, it is understandable for the States to attempt to prevent minors from using tobacco products before they reach an age where they are capable of weighing for themselves the risks and potential benefits of tobacco use, and other adult activities.~

The First Amendment also constrains state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating

information about its products and adult customers have an interest in receiving that information.

To the extent that federal law and the First Amendment do not prohibit state action, States and localities remain free to combat the problem of underage tobacco use by appropriate means. The judgment of the United States Court of Appeals for the First Circuit is therefore affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.